82-1972

No.

In the Supreme Court of the United States

October Term, 1982

MARK HOCHANADEL,
Petitioner,

vs.

DETCO TRAILER, INC., and LAWRENCE CORNELL,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KANSAS

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QUESTION PRESENTED

Whether the District Court of Wyandotte County, Kansas deprived petitioner of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution, by ordering a remittitur of the verdict in favor of petitioner or in the alternative granting a new trial.

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DETCO TRAILER, INC., and LAWRENCE CORNELL

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KANSAS

William H. Pickett, on behalf of Mark Hochanadel, petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of Kansas in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of Kansas dated December 30, 1982 (App. A, infra, A1-A2), is not reported. The opinion of the District Court of Wyandotte County, Kansas, dated October 29, 1981 (App. B, infra, A3-A7), is not reported. The opinion of the District Court of Wyandotte County, Kansas, dated December 11, 1981 (App. C, infra, A8-A15), is not reported.

JURISDICTION

The judgment of the Court of Appeals of Kansas (App. A, infra, A1-A2) was entered on December 30, 1982. A Motion for Rehearing and Rehearing En Banc before the Court of Appeals of Kansas was denied on January 19, 1983 (App. D, infra, A16). On March 8, 1983 a Petition for Review in the Supreme Court of Kansas was denied (App. E, infra, A17). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article One of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

2. Kansas Statutes Annotated 60-259(a) provides in pertinent part:

> A new trial may be granted to all or any of the parties and on all or part of the issues when it appears that the rights of the party are substantially affected:
>
> *First.* Because of abuse of discretion of the court, misconduct of the jury or party, or action or surprise which ordinary prudence could not have guarded against, or for any other cause whereby the party was not afforded a reasonable opportunity to present his evidence and be heard on the merits of the case.
>
> *Second.* Erroneous rulings or instructions of the Court.
>
> *Third.* That the verdict, report or decision was given under the influence of passion or prejudice.
>
> *Fourth.* That the verdict, report or decision is in whole or in part contrary to the evidence.

STATEMENT OF THE CASE

1. In July, 1981 a jury trial was had on petitioner's personal injury action against the two respondents, Lawrence Cornell and Detco Trailer, Inc., in the District Court of Wyandotte County, Kansas. Following that trial the jury returned a unanimous verdict in favor of petitioner against both respondents. The jury assessed petitioner's net recovery against the two respondents at Eight Hundred Fifty-Five Thousand Dollars ($855,000.00). On July 24, 1981 the district court entered judgment on that verdict (App. C, infra, A8-A9).

2. Subsequently, respondents made a Motion for a New Trial or, in the Alternative, Motion for Remittitur. Such Motion was argued on August 17, 1981, and on October 29, 1981 the district court, by memorandum decision, ordered a remittitur of the verdict to Three Hundred Sixty-Seven Thousand Eight Hundred Eighty-Eight Dollars and 50/100 ($367,888.50). The district court cited, as the basis for the remittitur ordered, *its feeling* that the verdict was outside the range of the evidence (App. B, infra, A3-A7).

3. On November 12, 1981 respondents moved to modify the district court's memorandum decision of October 29, 1981 to reflect an alternative order for new trial if petitioner rejected the remittitur. Petitioner then moved to strike respondents' motion to modify, and to reinstate the verdict. Such motions were argued on November 18, 1981 and at that hearing petitioner argued that the district court deprived him of property without due process of law by improperly ordering the remittitur. On November 20, 1981 the district court issued another order granting respondents a new trial in the event petitioner rejected the remittitur, and finding that the jury was influenced by passion and prejudice. Thereafter, on December 11, 1981

the district court filed its Journal Entry of Judgment reflecting that order of November 20, 1981 (App. C, infra, A8-A15).

4. On November 25, 1981 petitioner filed his original Notice of Appeal in the Court of Appeals of Kansas. Respondents filed their Notice of Cross Appeal on December 11, 1981. Petitioner's refusal to accept a remittitur was filed on December 21, 1981, as was petitioner's Amended Notice of Appeal in the Court of Appeals of Kansas. The district court then ordered a new trial.

5. On appeal, petitioner contended that the district court was without jurisdiction to enter its order directing a remittitur or in the alternative a new trial, in that the district court failed to comply with the substantive requirements of Kansas law, namely Kan. Stat. Ann. 60-259 (quoted above) as interpreted by the Supreme Court of Kansas. The Court of Appeals of Kansas, on December 30, 1982, dismissed petitioner's appeal on the ground that the district court's order complied with Kansas law, was within its jurisdiction, and was not appealable as of right (App. A, infra, A1-A2).

6. Subsequently, on January 10, 1983 petitioner submitted a Motion for Rehearing and Rehearing En Banc before the Court of Appeals of Kansas. That Motion was denied on January 19, 1983 (App. D, infra, A16). On January 31, 1983 petitioner filed a Petition for Review in the Supreme Court of Kansas, requesting that Court to review the decision of the Court of Appeals of Kansas rendered on December 30, 1982. That Petition for Review was denied on March 8, 1983 (App. E, infra, A17).

7. The federal question sought to be reviewed here was raised in the court of first instance (the District Court of Wyandotte County, Kansas) on November 18, 1981 at

the hearing on respondents' motion to modify the district court's order directing a remittitur. At that hearing counsel for petitioner argued that the district court committed gross error, in deprivation of petitioner's due process, by ordering the remittitur. Counsel for petitioner also argued that the district court was clearly taking property without due process by ordering the remittitur, and that the district court's actions consisted of taking without due process the property that petitioner has been awarded. Counsel for petitioner asserted that the district court's order had constitutionally abdicated petitioner's right in the jury verdict. The district court rejected petitioner's argument and on November 20, 1981 issued another order granting respondents a new trial in the event petitioner rejected the remittitur, and finding that the jury was influenced by passion and prejudice (App. C, infra, A8-A15).

8. Although this federal constitutional question was not explicitly raised in the appellate courts of Kansas, both the Court of Appeals of Kansas and the Supreme Court of Kansas implicitly ruled upon such issue by their dismissal of petitioner's appeal and denial of review of that dismissal. Even if petitioner failed to raise his federal constitutional challenge in the Kansas courts, this Court has jurisdiction to review plain error unchallenged in the state court to prevent fundamental unfairness, as exists here.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning a state court's power to modify a jury verdict and judgment thereon. The decision below essentially affirms a district court order entered without jurisdiction, and conflicts with the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The federal question has been decided in a way in conflict with applicable decisions of this Court.

1. Initially, this Court has jurisdiction to review the plain error of the Kansas courts which may have been inadequately challenged in those courts, because of the fundamental unfairness of the Kansas courts' decisions. *See Webb v. Webb*, 101 S.Ct. 1889, 1895 (1981), *Wood v. Georgia*, 101 S.Ct. 1097, 1100 n.5, 67 L.Ed.2d 220 (1981), and *Vachon v. New Hampshire*, 441 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974).

2. It is important to note that the Supreme Court of Kansas' refusal to review the judgment of the Court of Appeals of Kansas in this cause makes the judgment of the Court of Appeals of Kansas the final judgment for purposes of review by the Supreme Court pursuant to 28 U.S.C. § 1257(3). Annot., 29 L.Ed.2d 872, 877 (1972). *Gallick v. Baltimore & O. R. Co.*, 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963). *Harrison v. Missouri P. R. Co.*, 372 U.S. 248, 83 S.Ct. 690, 9 L.Ed.2d 711 (1963). *Andrews v. Virginia R. Co.*, 248 U.S. 272, 39 S.Ct. 101, 63 L.Ed. 236 (1919).

3. For the purposes of 28 U.S.C. § 1257(3) the judgment of the Court of Appeals of Kansas in this cause is also the judgment of the highest court of the State of Kansas in which a decision in the suit could be had. This results from the Supreme Court of Kansas' denial of the

petition for review of the Court of Appeals of Kansas' judgment. Annot., 61 L.Ed.2d 944, 948 (1980). *Bacon v. Texas,* 163 U.S. 207, 16 S.Ct. 1023, 41 L.Ed. 132 (1896). *American R. Express Co. v. Levee,* 263 U.S. 19, 44 S.Ct. 11, 68 L.Ed. 140 (1923). *Mellon v. O'Neil,* 275 U.S. 212, 48 S.Ct. 62, 72 L.Ed. 245 (1927). *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968). *Cohen v. California,* 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).

4. Due process requires, at a minimum, that absent a countervailing state interest of over-riding significance, persons forced to settle their claims of right and duty through the judicial process must be given a *meaningful opportunity to be heard. Boddie v. Connecticut,* 401 U.S. 371, 378, 91 S.Ct. 780, 785 (1971). The hallmark of "property" under the 14th Amendment's Due Process Clause is an individual entitlement grounded in state law, which cannot be removed except "for cause"; "[o]nce that characteristic is found, the types of interest protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.'" *Logan v. Zimmerman Brush Company,* 102 S.Ct. 1148, 1155 (1982). "[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits *fairly judged.*" *Id.* at 1156 (emphasis added). The fundamental requirement of due process is an opportunity to be heard, and it is an opportunity which must be granted at a meaningful time and in a meaningful manner. *Parratt v. Taylor,* 101 S.Ct. 1908, 1915 (1981).

5. This Court has recognized that due process has never been, and perhaps can never be, precisely defined. It is not a technical conception with fixed content unrelated to time, place and circumstances. Due process expresses the requirement of fundamental fairness. Applying the Due Process Clause is an uncertain enterprise which must

discover what fundamental fairness consists of in a particular situation by first considering any relevant precedent and then by assessing the several interests at stake. *Lassiter v. Department of Soc. Serv. of Durham Cty.*, 101 S.Ct. 2153, 2158 (1981). "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty or property." *Carey v. Piphus*, 435 U.S. 247, 260, 98 S.Ct. 1042, 1050 (1978).

Property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels or money. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572-73, 92 S.Ct. 2701, 2706 (1972). "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 578, 2709.

6. In this case, the Kansas courts deprived petitioner of a meaningful opportunity to be heard on his personal injury action against respondents. Those courts denied him the opportunity to present his case and have its merits fairly judged. His opportunity to be heard was not granted at a meaningful time and in a meaningful manner. Fundamental fairness was denied petitioner. The Kansas courts mistakenly and unjustifiably deprived petitioner of a property right, in clear violation of Kansas law.

7. It is clear that the Kansas courts have deprived the petitioner of property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution. Petitioner had a property right in the jury verdict, and judgment entered thereon on July 24, 1981, in the amount of Eight Hundred Fifty-Five Thou-

sand Dollars ($855,000.00). The district court deprived petitioner of such property right in the jury verdict and judgment thereon without due process of law by ordering a remittitur or in the alternative a new trial while lacking jurisdiction to do so, and also by acting unreasonably, arbitrarily and capriciously in entering such order.

The district court was without jurisdiction to enter its order of November 20, 1981 granting respondents a new trial if petitioner did not accept a remittitur. Such order was based on the district court's finding that the verdict was outside the range of evidence and the result of passion and prejudice (App. C, infra, A8-A15).

K.S.A. 60-259(a), quoted above, states the exclusive grounds for which a new trial may be granted in Kansas. *Mettee v. Urban Renewal Agency,* 219 Kan. 165, 167-68, 557 P.2d 356, 358 (1976); *Herbel v. Endres,* 202 Kan. 733, 736, 451 P.2d 184, 187-88 (1969); *Landscape Development Company v. Kansas City Power & Light Company,* 197 Kan. 126, 132-33, 415 P.2d 398, 404 (1966). One ground is that the verdict was given under the influence of passion or prejudice and another is that the verdict is contrary to the evidence. The Supreme Court of Kansas has held that a court must set forth with specificity its reasons in support of the statutory grounds of K.S.A. 60-259(a), and has no jurisdiction to grant a new trial or order a remittitur simply because it is dissatisfied with the verdict. *Mettee v. Urban Renewal Agency, cited above.*

The district court's bald statements that the verdict was outside the range of evidence and based on passion and prejudice are totally unsupported by specific reasons and substance as required by Kansas law. The district court's finding that the verdict was based on passion and prejudice was first made in its Journal Entry of Judgment dated December 11, 1981 (App. C, infra, A8-A15). The

district court's original memorandum of decision, dated October 29, 1981 (App. B, infra, A3-A7) states only that the district court feels that the verdict is outside the range of evidence. The later finding of passion and prejudice was made at the urging of respondents to support the district court's order of remittitur or new trial, and to reflect the well-settled principle that a district court cannot order a remittitur or in the alternative a new trial simply where it disagrees with the jury's findings and the verdict is supported by the evidence.

The record shows that the district court had no substantive support for its finding that the verdict was based on passion and prejudice, and was outside the range of evidence. The verdict was supported by expert testimony (See App. B, infra, A6). Specific grounds for the finding of passion and prejudice are absent. Even if the district court believed the verdict was rendered under the influence of passion and prejudice, it then had a duty to enter an order granting respondents a new trial and not a remittitur. *Slocum v. Kansas Power and Light Company*, 190 Kan. 747, 378 P.2d 51 (1963). The district court's order of remittitur or in the alternative a new trial contradicts its findings, the evidence, and Kansas law.

As a result the district court was clearly without jurisdiction to enter its order of November 20, 1981, ordering petitioner to accept a remittitur or in the alternative a new trial. Such order was entered simply because the district court was dissatisfied with the verdict, and is arbitrary, unreasonable and capricious.

8. It is evident, therefore, that the district court and the Court of Appeals of Kansas denied petitioner a meaningful opportunity to be heard. Petitioner was denied the opportunity to present his case and have its merits fairly judged. Petitioner was denied the fundamental

requirement of due process which is an opportunity to be heard, and an opportunity which must be granted at a meaningful time and in a meaningful manner. The due process requirement of fundamental fairness has been denied petitioner. Petitioner in this case was mistakenly and unjustifiedly deprived of his property right in the jury verdict and judgment thereon in violation of due process rules.

CONCLUSION

The decision below is palpably erroneous, and clearly evinces Kansas' violation of petitioner's due process rights under the Fourteenth Amendment to the United States Constitution. Petitioner has exhausted his remedies in the Kansas courts. The present petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

No. 54,005

MARK HOCHANADEL,
Appellant,

v.

DETCO TRAILER, INC., and
LAWRENCE CORNELL,
Appellees.

MEMORANDUM OPINION

(Filed December 30, 1982)

Appeal from Wyandotte District Court; CORDELL D. MEEKS, JR., judge. Opinion filed December 30, 1982. Appeal dismissed.

Michael E. Callen, of Barnett & Lerner, of Overland Park, and *William H. Pickett*, of William H. Pickett, P. C., of Kansas City, Missouri, for the appellant.

Edward M. Boddington, Jr., of Boddington & Brown, of Kansas City, for the appellees.

Before SPENCER, P.J., PARKS, J., and HARRY G. MILLER, District Judge Retired, Assigned.

PARKS, J.: After trial of this case, the district court granted the defendants' motion for remittitur or new trial.

Plaintiff Mark Hochanadel rejected the offer of remittitur and appeals the order granting a new trial.

An order granting a new trial is generally not appealable as a final judgment unless the order is challenged on jurisdictional grounds. *Brown v. Fitzpatrick,* 224 Kan. 636, 638, 585 P.2d 987 (1978). The grant of a new trial is beyond the court's jurisdiction if it is granted upon grounds not enumerated in K.S.A. 60-259 (*a*). *Smith v. Morris,* 2 Kan.App.2d 59, 62, 574 P.2d 568 (1978).

In the present case, the trial court found that the jury's verdict was based on passion and prejudice and outside the range of the evidence. Such findings being grounds under K.S.A. 60-259 (*a*) *Third* and *Fourth* for a new trial, the decision of the trial court was within its jurisdiction and not appealable as of right.

Appeal dismissed.

APPENDIX B

IN THE DISTRICT COURT OF KANSAS

No. 78C1323

MARK HOCHANADEL,
Plaintiff,

v.

DETCO TRAILER, INC., and
LAWRENCE CORNELL,
Defendants.

MEMORANDUM DECISION

(Filed on October 29, 1981)

Defendants' motion for new trial or in the alternative for remittitur was argued to the Count (sic) on August 17, 1981, at which time the matter was taken under advisement by the Court. The following is the Court's decision on those motions.

The first ground alleged by defendants for a new trial is that Instruction No. 16 is erroneous in that the Court failed to give grounds No. 2 and No. 3, that plaintiff failed to observe the near approach of the truck and that he failed to observe the moving truck when he knew or should have known that trucks were regularly being moved in lots such as that of the defendant. The evidence does not support the contention that plaintiff could have or should have known or observed the moving truck but to the contrary, that the whole thing happened so suddenly and at such a slow speed, no reasonable person would have had a duty to expect the truck to back into him, without stopping. Otherwise, pedestrians in all types of parking lots would be expected to exercise such a degree of caution as to require traffic signals. While it

is true plaintiff's experience required him to know that some vehicles in parking lots do move occasionally, the law does not require him to expect to be backed into, especially by a slow moving truck. The deletion of those two additional grounds in Instruction No. 16 does not prejudice the defendant in any way.

The second ground for a new trial alleged by defendants is that the Court erred in failing to admit defendants' instructions 17 through 20. These instructions dealing with plaintiff's burden to exercise a degree of care for his own safety are covered adequately in Instruction No. 22 which sets out the duties of a business visitor. The evidence simply did not support defendants requested Instructions 18, 19 or 20. Again, because of the circumstances surrounding the accident, plaintiff was not bound to observe objects he should have seen. No reasonable person could have seen the truck according to the evidence as it was presented. It was not properly an issue for the jury. Had plaintiff been accustomed to experiencing pedestrians getting hit by trucks in such parking lots perhaps defendants' instructions would have been proper. But there was no evidence to suggest plaintiff's experience extended that far. As was stated in Instruction No. 22, plaintiff "does not have a duty, however, to look for danger where there is no reason to apprehend any."

Defendants' third reason for requesting a new trial is that Instructions No. 25 and No. 26 were erroneous. Instruction No. 25 is a modification of P.I.K. 2d 8.03. The issue is whether it is an over broad modification. The Court is inclined to follow plaintiff's reasons for modifying this instruction and adopt them as its own. Neither Instruction prejudices the rights of the defendants and the Court feels that from all the evidence, the result of imposing liability on the defendants would have been the same with or without these instructions.

As to the amount of the verdict being excessive the Court is mindful that if the verdict is within the range of the evidence, the Court cannot substitute its judgment for that of the jury. *Metee v. Urban Renewal Agency,* 219 Kan 165. The verdict must be within the range of the evidence. Instruction No. 18 allowed the jury to consider "such amount of money as will reasonably compensate him for his injuries and losses" including pain, suffering, disabilities, accompanying mental anguish to date and in the future, reasonable expenses of necessary medical care, hospitalization now and in the future and loss of time or income now and in the future. The jurors were further instructed that there is no mathematical formula for such items as pain, suffering, disability and mental anguish. The amount to be awarded was left to the sound discretion of the jury. Instruction No. 19 allowed a sum for loss and impairment of plaintiff's ability to perform services as a husband to his wife, such things as domestic and household duties, companionship, aid, assistance, comfort and society to his wife. Instruction No. 20 said life expectancy tables indicate plaintiff would live another 35.6 years.

The most difficult task in trying to decide a remittitur motion is separating the issue of liability from determining amount. There is no question that defendants have now been found to be responsible and their percentage of fault is no longer at issue. There is still a great compulsion to look at the evidence and try to determine that this was not really a very serious accident. There are no allegations of gross negligence or even injuries that would shock the conscience of the Court. The jury has decided that a man who was slightly touched by a truck and who never realized his injuries until almost two years later, injuries that admittedly could have been caused by any number of things, was injured in fact

due to that slight accident. Plaintiff did a remarkable job of showing causation or probable cause. However, that is not to be taken into account in a motion for remittitur. The one issue is whether the jury somehow abused their privilege of using sound discretion in light of the evidence presented.

Certainly, there is no question about the reasonableness of medical care and expenses of a few thousand dollars. The evidence clearly justified these expenses. The question is whether all those intangible items remaining added up to $950.000.00 (sic), reduced to $855,000.00 by a 10% percentage of fault attributed to plaintiff. The fact that plaintiff's statement of monetary damages was $4,000,000.00 does not aid the Court in making a decision. It is not uncommon for such demands to be exorbitant to sway settlement negotiations.

The only place where there is mention of large sums of money is in plaintiff's exhibit 85. That exhibit suggests that plaintiff's total loss of wages, bonuses, and household services could range from $378,765 to $1,725,686 depending on whether plaintiff was considered severely or occupationally disabled. Severe meant unable to work altogether or unable to work regularly. Occupationally disabled meant able to work regularly, but unable to do the same work as before the onset of disability or unable to work full-time.

According to plaintiff's exhibits 28, 29 and 30, which are income tax returns for the years surrounding the accident date of April 26, 1978, plaintiff earned some $38,000 in 1977, $38,000 in 1978, $42,000 in 1979, and $35,000 in 1980. He was working for the same employer, Kenworth Sales and Service. This evidence along with testimony of plaintiff would indicate he suffered only an occupational disability. With wage increases at historic

national rates for experienced managers; plaintiff's loss of wages, bonuses and household services would not exceed for the pretrial and post-trial periods, $378,765.00.

It is the Court's feeling that the jury may have become confused by plaintiff's exhibit 85 and rendered its verdict based on incorrect figures. Defendant has not really given the Court anything to go on in its request for a remittitur except a blanket statement that the verdict was so excessive as to shock the conscience of the Court. But, the Court has researched the record of the trial on its own because the Court's conscience was at least stirred by the size of the verdict, and the Court was curious as for the reason.

After reviewing the record and recalling the evidence, the Court feels the original verdict is outside the range of the evidence. The Court feels a more appropriate verdict would have been $378,765 for loss of wages, bonuses and household services, $10,000 for medicals and $20,000 for pain and suffering for a total of $408,765.00 and reduced by 10% for a net total of $367,888.50.

IT IS SO ORDERED.

Respectfully submitted,

/s/ Cordell D. Meeks, Jr.
Cordell D. Meeks, Jr.
Judge of the District Court
Division No. Six

APPENDIX C

IN THE DISTRICT COURT OF WYANDOTTE
COUNTY, KANSAS
CIVIL COURT DEPARTMENT

No. 78-C-1323

MARK HOCHANADEL,
Plaintiff,

v.

DETCO TRAILER, INC., and
LAWRENCE R. CORNELL,
Defendants.

JOURNAL ENTRY OF JUDGMENT

(Filed December 11, 1981)

Now, on this 24th day of July 1981, comes on for hearing before a jury plaintiff Mark Hochanadel's claim for damages against defendant Detco Trailer, Inc., and defendant Lawrence R. Cornell. The plaintiff appears by William H. Pickett, Paul L. Redfearn, III, and Michael E. Callen, his attorneys of record; the defendants appear by Edward M. Boddington, Jr., and Kenneth E. Holm, their attorneys of record. Thereupon, the cause proceeds to trial from day to day.

The jury, having heard the evidence and instructed on the law, unanimously finds plaintiff Mark Hochanadel to have suffered damages in the amount of Nine Hundred Fifty Thousand Dollars ($950,000.00) as a result of the occurrence, with defendant Detco Trailer, Inc., 75% at fault for the occurrence; defendant Lawrence R. Cornell 15% at fault for the occurrence; and plaintiff Mark Hochanadel 10% at fault for the occurrence. Upon the unanimous jury verdict, it is hereby

ORDERED, ADJUDGED AND DECREED, that judgment be entered on this 24th day of July, 1981, in favor of plaintiff Mark Hochanadel and against defendant Detco Trailer, Inc., in the amount of Seven Hundred Twelve Thousand Five Hundred Dollars ($712,500.00), and it is further

ORDERED, ADJUDGED AND DECREED, that judgment be entered on this 24th day of July, 1981, in favor of plaintiff Mark Hochanadel and against defendant Lawrence R. Cornell in the amount of One Hundred Forty Two Thousand Five Hundred Dollars ($142,500.00).

Defendant's Motion for New Trial or, in the Alternative, for Remittitur, was argued to the Court on August 17, 1981, at which time the matter was taken under advisement by the Court. On October 29, 1981, the Court rendered its decision on the defendants' motions, as follows:

The first ground alleged by defendants for a new trial is that Instruction No. 16 is erroneous in that the Court failed to give grounds No. 2 and No. 3, that plaintiff failed to observe the near approach of the truck and that he failed to observe the moving truck when he knew, or should have known, that trucks were regularly being moved in lots such as that of the defendant. The evidence does not support the contention that plaintiff could have, or should have known, or observed the moving truck, but, to the contrary, that the whole thing happened so suddenly and at such a slow speed, no reasonable person would have had a duty to expect the truck to back into him, without stopping. Otherwise, pedestrians in all types of parking lots would be expected to exercise such a degree of caution as to require traffic signals. While it is true plaintiff's experience required him to know that some vehicles in parking lots do move occasionally, the

law does not require him to expect to be backed into, especially by a slow moving truck. The deletion of those two additional grounds in Instruction No. 16 does not prejudice the defendant in any way.

The second ground for a new trial alleged by defendants is that the Court erred in failing to admit defendants' Instructions No. 17 through No. 20. These instructions, dealing with plaintiff's burden to exercise a degree of care for his own safety, are covered adequately in Instruction No. 22, which sets out the duties of a business visitor. The evidence simply did not support defendants' requested Instructions No. 18, 19 or 20. Again, because of the circumstances surrounding the accident, plaintiff was not bound to observe objects he should have seen. No reasonable person could have seen the truck according to the evidence as it was presented. It was not properly an issue for the jury. Had plaintiff been accustomed to experiencing pedestrians getting hit by trucks in such parking lots, perhaps defendants' Instructions would have been proper. But there was no evidence to suggest plaintiff's experience extended that far. As was stated in Instruction No. 22, plaintiff "does not have a duty, however, to look for danger where there is no reason to apprehend any."

Defendants' third reason for requesting a new trial is that Instructions No. 25 and 26 were erroneous. Instruction No. 25 is a modification of P.I.K. 2d 8.03. The issue is whether it is an overly broad modification. The Court is inclined to follow plaintiff's reasons for modifying this Instruction and adopt them as its own. Neither Instruction prejudices the rights of the defendants and the Court feels that from all the evidence, the result of imposing liability on the defendants would have been the same with or without these Instructions.

As to the amount of the verdict being excessive, the Court is mindful that if the verdict is within the range of the evidence, the Court cannot substitute its judgment for that of the jury. *Metee v. Urban Renewal Agency,* 219 Kan. 165. The verdict must be within the range of the evidence. Instruction No. 18 allowed the jury to consider "such amount of money as will reasonably compensate him for his injuries and losses", including pain, suffering, disabilities, accompanying mental anguish to date and in the future, reasonable expenses of necessary medical care, hospitalization now and in the future, and loss of time or income now and in the future. The jurors were further instructed that there is no mathematical formula for such items as pain, suffering, disability and mental anguish. The amount to be awarded was left to the sound discretion of the jury. Instruction No. 19 allowed a sum for loss and impairment of plaintiff's ability to perform services as a husband to his wife, such things as domestic and household duties, companionship, aid, assistance, comfort and society to his wife. Instruction No. 20 said life expectancy tables indicate plaintiff would live another 35.6 years.

The most difficult task in trying to decide a remittitur motion is separating the issue of liability from determining amount. There is no question that defendants have now been found to be responsible and their percentage of fault is no longer at issue. There is still a great compulsion to look at the evidence and try to determine that this was not really a very serious accident. There are no allegations of gross negligence or even injuries that would shock the conscience of the Court. The jury has decided that a man who was slightly touched by a truck and who never realized his injuries until almost two years later, injuries that admittedly could have been caused by any number of things, was injured, in fact,

due to that slight accident. Plaintiff did a remarkable job of showing causation or probable cause. However, that is not to be taken into account in a motion for remittitur. The one issue is whether the jury somehow abused their privilege of using sound discretion in light of the evidence presented.

Certainly, there is no question about the reasonableness of medical care and expenses of a few thousand dollars. The evidence clearly justified these expenses. The question is whether all those intangible items remaining added up to $950,000.00, reduced to $855,000.00 by a 10% percentage of fault attributed to the plaintiff. The fact that plaintiff's statement of monetary damages was $4,000,000.00 does not aid the Court in making a decision. It is not uncommon for such demands to be exorbitant to sway settlement negotiations.

The only place where there is mention of large sums of money is in plaintiff's Exhibit 85. That exhibit suggests that plaintiff's total loss of wages, bonuses and household services could range from $378,765.00 to $1,725,686.00, depending on whether plaintiff was considered severely or occupationally disabled. "Severe" meant unable to work altogether or unable to work regularly. "Occupationally disabled" meant able to work regularly, but unable to do the same work as before the onset of disability or unable to work full-time.

According to plaintiff's Exhibits 28, 29 and 30, which are income tax returns for the years surrounding the accident date of April 26, 1978, plaintiff earned some $38,000.00 in 1977; $38,000.00 in 1978; $42,000.00 in 1979; and $35,000.00 in 1980.

He was working for the same employer, Kenworth Sales and Service. This evidence, along with testimony

of plaintiff, would indicate he suffered only an occupational disability. With wage increases at historic national rates for experienced managers, plaintiff's loss of wages, bonuses and household services would not exceed, for the pre-trial and post-trial periods, $378,765.00.

It is the Court's feeling that the jury may have become confused by plaintiff's Exhibit 85 and rendered its verdict based on incorrect figures. Defendants have not really given the Court anything to go on in their request for a remittitur except a blanket statement that the verdict was so excessive as to shock the conscience of the Court. But, the Court has researched the record of the trial on its own because the Court's conscience was at least stirred by the size of the verdict, and the Court was curious as for the reason.

After reviewing the record and recalling the evidence, the Court feels the original verdict is outside the range of the evidence. The Court feels a more appropriate verdict would have been $378,765.00 for loss of wages, bonuses and household services; $10,000.00 for medicals; and $20,000.00 for pain and suffering; for a total of $408,765.00, and reduced by 10% for a net total of $367,888.50.

And now, on this 18th day of November, 1981, comes on for hearing the defendants' Motion to Modify the Court's Memorandum Decision of October 29, 1981; plaintiff's Motion to Strike Defendants' Motion to Modify, plaintiff's Motion to Eliminate Ten Percent Deduction by Jury of any causal responsibility of plaintiff, Mark Hochanadel, because the giving of Instruction No. 16 was plain error as is revealed by the Court's own comments in its Order dated October 29, 1981, relating to what would be expected of the plaintiff under the circumstances of the

accident, and plaintiff's Motion to Reinstate the Jury Verdict in the amount of $950,000.00.

The parties appear as before and the Court, after hearing arguments of counsel from both sides, grants the defendants' Motions for Remittitur and Modification of the Court's Memorandum Decision of October 29, 1981, and denies the plaintiff's motions.

The Court further finds that the jury's verdict was based on passion and prejudice and shocked the conscience of the Court.

IT IS, THEREFORE, BY THE COURT ORDERED, ADJUDGED AND DECREED, that remittitur is hereby granted and that the judgment heretofore entered is reduced to the sum of $367,888.50 and $306,573.75 is assessed against defendant Detco Trailer, Inc., and $61,314.75 is assessed against defendant Lawrence R. Cornell.

IT IS FURTHER BY THE COURT ORDERED, ADJUDGED AND DECREED, that the reduction in damages is upon the condition that the plaintiff accept or reject the reduced amount of damages, in writing, within ten days from the entry of this Order, by filing the acceptance or rejection with the Clerk of the District Court, or, on his failure to accept Remittitur within the allotted time, the defendants are granted a new trial on all issues because of the above findings of the Court.

IT IS SO ORDERED.

/s/ Cordell D. Meeks, Jr.
The Honorable Cordell D. Meeks, Jr.

Approved:

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APPENDIX D

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

No. 81-54005-A

MARK HOCHANADEL,
Appellant,

v.

DETCO TRAILER, INC., and
LAWRENCE R. CORNELL,
Appellees.

DENIAL OF APPELLANT'S MOTION FOR REHEARING

(Filed January 19, 1983)

You are hereby notified of the following action taken in the above entitled case:

Appellant's motion for rehearing.

Denied.

Yours very truly,

Lewis C. Carter
Clerk, Court of Appeals

Date Jan. 19, 1983

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 81-54005-A

MARK HOCHANADEL,
Appellant,

v.

DETCO TRAILER, INC., and
LAWRENCE R. CORNELL,
Appellees.

DENIAL OF PETITION FOR REVIEW

(Filed March 8, 1983)

You are hereby notified of the following action taken in the above entitled case:

Petition for review.

Denied.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date March 8, 1983